STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 9516
)
Appeal of)

INTRODUCTION

The petitioner appeals the Department of Social Welfare's determination that she is ineligible for ANFC due to the receipt of a lump sum payment in the form of a divorce settlement representing her share of the marital home.

FINDINGS OF FACT

1. In late November, 1988, the petitioner and her husband (now her ex-husband) sold a home jointly owned and occupied by them as their family residence and moved to a rental unit.

2. The home was sold because the taxes were too high and the petitioner's ex-husband wanted to use the proceeds to invest in a speculation house. The money was placed in a savings account in both parties' names.

3. During the second week of February, 1989, the petitioner and her husband separated. In mid-March of 1989, after the parties deciding to divorce, the petitioner's husband unilaterally and without the consent of the petitioner transferred the proceeds from their savings account to a business account held in his name only. At the time of the transfer the petitioner was at the Central Vermont Hospital

where she was being treated for a manic depressive illness and where she remained until mid-April of 1989. She was, however, vaguely aware that the money had been transferred and would be put into the "spec" house. She was not involved in the reinvestment of the money and her name was not included on the deed as an owner of that property.

4. On May 1, 1989, the petitioner applied for and eventually received ANFC for herself and her 2 children. At that time, the divorce action was still pending and all the proceeds from the sale had been reinvested and were tied up in a business venture, namely a "spec" house.

5. On July 17, 1989, as part of the divorce action, the parties filed a permanent stipulation with the Court which stated as follows:

> The parties (sic) marital home was sold in November, 1988. The proceeds of that sale, less expenses of sale and payments made by the defendant for mutual debts of the parties, netted the sum of eighty-one thousand one hundred and ten dollars ($81,110.00). The defendant shall pay to the plaintiff one-half that sum, or forty thousand five hundred fifty-five dollars ($40,555.00). Such payment shall be made at the time of the closing, but in no case any later then September 30, 1989, on the sale of a house being built on speculation by the defendant and another partner on [name] Road in [city], Vermont, in which the defendant has invested the plaintiff's share of the parties (sic) equity. This obligation by the defendant to the plaintiff shall survive any disposition of the investment house, whether by foreclosure or otherwise.

6. Based on the language of the stipulation, it is found that the $40,555.00 represented only money derived from the sale of the marital home and that there was never

any intention expressed in the stipulation that the petitioner receive any profit from the speculation house. The language involving the speculation house was inserted merely to explain where the petitioner's share of the marital estate proceeds was at that time and to explain when (on closing of the spec house) that money would be returned to her.

7. The petitioner notified the department that she would be getting the property settlement payment and was advised by her worker that such payment when received would be considered a "lump sum" and would disqualify her from receiving benefits for an extended period of time. The petitioner indicated that she understood that information.

8. On June 16, 1989, the petitioner signed an agreement to purchase a house for $37,300.00, "Contingent upon the sale of buyer's home in "Sharon, Vermont." The home referred to was the "spec" house. The petitioner acknowledges that she did not own that house but that the contingency was placed in the sales agreement to reflect the divorce stipulation.

9. On October 27, 1989, the petitioner received a check for $40,550.00 representing her share of the equity in their marital home sold in late November of 1988. She used that check immediately to purchase the house on which she had made a contract.

10. On November 17, 1989, the petitioner was notified that her grant would close on November 30, 1989, due to

receipt of the $40,550.00 divorce settlement until May of 1994, subject to a periodic shortening upon the occurrence of certain events, none of which are at issue in this matter.

11. On November 20, 1989, the Court entered a final judgement order which stated that "the defendant has paid to the plaintiff her share of the equity in the parties real estate, in the amount of forty thousand five hundred and fifty dollars ($40,550.00)."

ORDER

The department's decision to treat the petitioner's divorce settlement as lump sum income is reversed and the matter is remanded to the department for treatment of her settlement as a resource.

REASONS

For many years, Title IV-A of the Social Security Act has required state plans to consider a family's "income" and "resources" when determining whether or not it is needy, but has not defined those terms other than to specifically include real and personal property as resources. See 42 U.S.C. э 602(a)(7)(A) and 42 U.S.C. э 602(a), generally. Historically, the Department of Health and Human Services, the agency charged with the implementation of the Act, did not adopt regulations defining those terms but rather left their definition to the states. See Lukhard v. Reed, 481 U.S. 368, 107 S.Ct. 1807 (1987). The designation of wealth under either term is significant because "resources", unlike income, can be excluded up to a certain maximum. See W.A.M. э 2261.

At the request of HHS, who had been concerned that ANFC recipients were quickly spending "windfall" lump sum payments in order to maintain their eligibility,[1] Congress enacted Section 2304 of the Omnibus Reconciliation Act of 1981 (OBRA), 95 Stat. 845, as amended, which reads, in pertinent part, as follows:

> A state plan for aid and services to needy families with children must . . .
>
> (17) provide that if a child or relative applying for or receiving aid to families with dependent children, or any other person whose need the State considers when determining the income of a family, receives in any month an amount of earned or unearned income which, together with all other income for that month not excluded under paragraph (8), exceeds the State's standard of need applicable to the family of which he is a member . . .
>
> > (A) such amount of income shall be considered income to such individual in the month received, and the family of which such person is a member shall be ineligible for aid under the plan for the whole number of months that equals (i) the sum of such amount and all other income received in such month, not excluded under paragraph (8), divided by (ii) the standard of need applicable to such family, and
> >
> > (B) any income remaining (which amount is less than the applicable monthly standard) shall be treated as income received in the first month following the period of ineligibility specified in subparagraph (A); . . .
>
> 42 U.S.C. э 602(a).

This amendment was reflected in the federal regulations at 20 C.F.R. э 233.20(a)(3)(ii)(F) and adopted by the Vermont Department of Social Welfare at W.A.M. э 2250.1.[2]

That lump sum amendment like the rest of the Act did not define "earned and unearned income". Neither did the federal regulations. In 1986, HHS for the first time adopted a regulation which attempted, at least for purposes of lump sum income, to define "earned or unearned income":

> (F) When the AFDC assistance unit's income, after applying applicable disregards, exceeds the State need standard for the family because of receipt of nonrecurring earned or unearned lump sum income *(including for AFDC, title II and other retroactive monthly benefits, and payments in the nature of a windfall, e.g., inheritances or lottery winnings, personal injury and worker compensation awards, to the extent it is not earmarked and used for the purpose for which it is paid, i.e., monies for back medical bills resulting from accidents or injury, funeral and burial costs, replacement or repair of resources, etc.),* the family will be ineligible for aid for the full number of months derived by dividing the sum of the lump sum income and other income by the monthly need standard for a family of that size. Any income remaining from this calculation is income in the first month following the period of ineligibility. The period of ineligibility shall begin with the month of receipt of the nonrecurring income or, at State option, as late as the corresponding payment month. For purposes of applying the lump sum provision, family includes all persons whose needs are taken into account in determining eligibility and the amount of the assistance payment. . . .

45 C.F.R. ϶ 223.20(a)(3)(ii)(F) (emphasis added).

In order to reflect HHS's new definitions, on July 1, 1989, DSW amended its regulations to read as follows (underlined portions represent the added changes):

> *Resources*
>
> Resources are defined as any assets, other than income, which an applicant ANFC assistance group has available to meet need. Such assets generally take the form of real or personal property owned by the recipients, individually or jointly with other persons . . . *Any liquid asset which is received by a member of an ANFC assistance group during a period of receipt*

of ANFC benefits (including assistance groups which receive zero benefits due to an entitlement of less than $10.00 or due to recoupment) and is not otherwise excluded from consideration as income or resources in the determination of eligibility for ANFC shall be treated as Lump Sum Income and is subject to the regulations under this heading (see W.A.M. 2250.1). This includes liquid assets obtained as a result of the sale of an excluded resource.

W.A.M. ∍ 2260 - 2269 (emphasis added).

Property Sale

Lump sum settlement from sale of real or personal property owned by an ANFC assistance group member during a period of receipt of ANFC benefits generally has the effect of converting an excluded asset to a liquid asset subject to the Lump Sum Income policy (see W.A.M. ∍ 2250.0). An exception is a recipient who sells real property, used and occupied as the permanent home, shall be permitted to retain the net proceeds from that sale for a period not to exceed 90 days providing that:

1. Net proceeds are held in trust; and

2. The plan is to use these proceeds for purchase or construction of another home; and

3. The recipient certifies that the money will be held in trust only for the purpose of obtaining another home.

4. If at the end of the 90 day period there is no agreement to purchase another permanent home (which shall be occupied within 60 days from date of agreement) or to construct a home (which shall be completed and occupied within twelve months from date of agreement), the trust is subject to the Lump Sum Income policy.

W.A.M. ∍ 2261.2(a).

Because the Vermont regulations treat all liquid assets received by an ANFC recipient as income subject to the lump sum rule, the cash received by the petitioner which represented her share of the proceeds from her marital home was considered "income" instead of a resource and she was determined to be subject to disqualification for some four years under the lump sum rule, even though she immediately reconverted that liquid asset by purchasing another home.

The petitioner contends that her property settlement should not have been counted as "income" on two grounds. First, the petitioner asserts that her lump sum settlement payment was the result of the sale of real property used and occupied as a permanent home, and as a result should fall within the exception to the regulations at W.A.M. э 2261.2(a). Secondly, the petitioner asserts that the department's regulations defining liquidated assets as "income" are in conflict with federal law and regulations which define "income" for lump sum rule purposes more narrowly.

To succeed in her first argument, the petitioner must show that she sold her prior home no more than 90 days before the purchase of her new home and had held that money in trust only to buy another home. W.A.M. э 2261.2(a), supra. The petitioner was unable to make such a showing as the facts clearly indicate that the petitioner sold her home some eleven months before her new home was purchased for the purpose of investing the proceeds in a business venture. Even if the petitioner's disability and her husband's unauthorized use of her share of the home proceeds in mid-March were to toll the running of any time period for holding the funds, the petitioner still must be found to have had the legal use of these funds for some four months (November through mid-March) before she even went on assistance, during which time she was clearly not holding the money solely for the purchase of a new home. Although as a practical matter, the petitioner's receipt of the property settlement resulted in her using the proceeds from the sale of her former home to buy a new one, her situation does not meet the criteria set out in the regulations. As she has made no argument that the criteria adopted by the department are illegal, it must be found that her property settlement was not wrongfully counted as "income" under the wording in the department's regulations at W.A.M. э 2261.2(a).

The petitioner's second argument that those portions of the department's regulations adopted July 1, 1989, as set out through underlining above, are themselves illegal because they redefine all liquid assets as income in violation of federal law and regulations appears to have more merit. If the petitioner is correct, and these regulations are in fact in conflict with and more narrowly restrict eligibility than federal law, those regulations cannot be used to deny eligibility to the petitioner.

The language of the federal regulation subjects "nonrecurring earned or unearned lump sum income" to the rule and defines such income as including (1) "retroactive monthly benefits" and (2) "payments in the nature of a wind fall". See 45 C.F.R. э 233.20(a)(3)(ii)(F), supra. The department argues that HHS in using the language "windfall payment" intended liquidated lump sums regardless of source to be included in the definition of "lump sum income". In support of its position, the department points to comments made by the department in the federal register when the rule was promulgated:

> The general rule in assistance programs is that all earned and unearned funds received by an assistance unit must be counted as income for the month of receipt except funds that are expressly disregarded as income in a Federal statute. However, under long-standing Federal policy for the AFDC and adult assistance programs, a State agency has had the option to treat non-recurring payments which are in the nature of a windfall as resources instead of as income. A windfall is a sum that is not earned, does not occur on a regular basis, and does not represent accumulated monthly income received in a single sum. A windfall might come from an inheritance, lottery winnings, personal injury awards or an income tax refund, but not title II Social Security or VA benefits. Social Security and VA benefits covering more than one month's benefits are instead examples of accumulated monthly income received in a single lump sum.
>
> In reviewing the legislative history of OBRA, <u>we believe that the Congress intended all lump sum payments (including windfalls) to be treated as income under the AFDC program.</u> The Senate Finance Committee Report, No. 97-139, dated November 17, 1981 (on page 505) indicates the lump sum income should be "considered available to meet the ongoing needs of an ANFC family . . . ". Given the intent of the lump sum provision to assure use of available funds in future months, we believe that windfall payments should be considered lump sum income. In the absence of the change, the very type of payments Congress intended to be counted and used to meet the family's future needs may not be budgeted for meeting future needs, if treated initially as a resource and not retained. Accordingly, for AFDC, we have classified payments in the nature of a windfall (with the sole exception of income tax refunds) as unearned income form a non-recurring source and treat them as a lump sum in accordance with 233.20(a)(3)(ii)(F) unless otherwise disregarded, e.g., under the casual and inconsequential income policy at ∍ 233.20(a)(3)(iv).

. . .

Comment: Twenty four commenters expressed concern about this provision suggesting that flexibility remain with the States to determine whether to count payments in the nature of a windfall as income or resources. The commenters argue that: (1) There is no inferred or expressed Congressional intent in OBRA's legislative history that HHS should change its long-standing policy of permitting States to count payments in the nature of a windfall as income or resources, i.e., by the OBRA amendments, Congress meant to change the methodology applicable to lump sum income but not the definition of lump sum income; (2) there is logic to treating retroactive benefits in this manner because they are linked to ongoing benefits which can be used to meet future needs, while this is not so with nonrecurring windfall type benefits; (3) the statute provides a $1,000 resource limit and individuals who do not have the maximum resource limit when they come on the rolls but subsequently receive a windfall payment should be allowed to build up their resource limit from nonrecurring lump sum payments; and (4) individuals should be able to set aside the money from windfall payments for items not covered by the AFDC grant or Medicaid such as treatment, special education, special equipment, etc., or simply to build up a cushion for future emergencies.

Response: We have carefully considered the comments received and continue to believe that the provision is not only supportable under the statute but consistent with recent legislative history that large nonrecurring payments be considered available to meet the ongoing needs of an AFDC family. <u>There is no logical basis for distinguishing between one type of large nonrecurring payment and another in determining whether it is income or resources and whether to apply the lump sum rule.</u> From one standpoint, the legislative history expresses concern that considering such payments, prior to OBRA, as income in the month received and a resource thereafter had the perverse effect of encouraging the family to spend the income as quickly as possible in order to retain AFDC eligibility. Since some States have always considered such payments as income, there was no specific definition of lump sum income that existed that can be argued that the Congress intended to maintain. <u>Given the Congress' clear intent to have lump sums be used to meet future needs, States should not be allowed to exclude them by calling them resources.</u>

States must disregard from the lump sum payment any amount that is earmarked and used for the purpose for which it is paid, i.e., monies paid for back medical bills resulting from accidents or injury, funeral and burial costs, replacement or repair or resources, etc.

Finally, section 402(a)(17) of the Act, as amended by the Deficit Reduction Act of 1984 (Pub. L. 98-369), permits States to consider hardship situations and recalculate, under certain specified circumstances, the period of ineligibility determined under the lump sum rule.

51 F.R. 9196 (March 18, 1986) (emphasis added).

The department relies especially on the underlined sections in the comments to support its contention that the regulations require or authorize state plans to treat all liquidated sums of money received by ANFC recipients from whatever source (income or resources) as income subject to the "lump sum rule".

The petitioner argues that the department's interpretation is incorrect and that the Secretary of HHS has on at least two occasions specifically and publicly stated that liquidated assets are not to be treated as income for purposes of the lump sum rule. The first instance is a comment made in the Federal Register following the enactment of the OBRA lump sum amendment but before the definitional regulations were promulgated:

Comment: One commenter questioned whether money received from the sale of allowable resources is exempt [from the lump sum rule].

Response: As the term resources includes both liquid and non-liquid assets, the change from a non-liquid asset, e.g., a bicycle valued as $50 to cash of $50 through the sale of that asset, does not change the total value of the assets held and such resource would be exempt if the allowable statutory amount were not exceeded.

47 F.R. 5657 (February 5, 1982).

The second instance is in a brief filed by the Secretary of HHS in a lawsuit, Lukhard, supra before the Supreme Court in the October term of 1986 which challenged a State's inclusion of personal injury awards under the definition at 20 C.F.R. ∍ 233.20(a)(3)(ii)(F). In that brief the Secretary cited the above regulation stating:

> Respondents' argument (Br: 31-33) that the 1986 regulation departs from prior policy statements of the Secretary is also mistaken. The 1986 regulation simply does not, as respondents mistakenly assert, require states to treat lump-sum payments received from the sale of real or personal property as "income." See 51 Fed. Reg. 9205 (1986) (to be codified as 45 C.F.R. 233.20(a)(3)(ii)(F)); see also 51 Fed. Reg. 9196-9197 (1986). The Secretary has never characterized proceeds from the sale of property as lump sum "windfalls." See 47 Fed. Reg. 5648, 5657 (1982).
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> Reply Brief of the Secretary of Health and Human Services as Respondent Supporting Petitioner in Lukhard v. Reed, supra page 9.

The petitioner argues that these statements by the Secretary make it clear that HHS never intended that states should include sums which represent the conversion of assets to liquid assets in the definition of "earned or unearned income" under the lump sum rule.

The hearing officer finds the petitioner's interpretation to be the most persuasive, not only because the Secretary has specifically stated that assets converted to cash are not included in the definition of "income" but most importantly because the language of the regulation itself cannot fairly be interpreted as including such payments as lump sum "income". A liquidated resource is indisputably not the "accumulated retroactive monthly benefit" referred to in the regulation, so if it is to be included in the definition of "income" it must be a "payment in the nature of a windfall." "Windfall" is not itself defined in the regulations but examples of "windfalls" are given which include "inheritances or lottery winnings, personal injury and worker compensation awards, to the extent it is not earmarked and used for the purpose for which it is paid, i.e., monies for back medical bills, resulting from accidents or injury, funeral and burial costs, replacement or repair of resources, etc." The comments at 51 Fed. Reg. 9196 set out above further define some things that a "windfall" is not (not earned, does not occur on a regular basis, does not represent accumulated monthly income received in a single sum), but does not shed much light on what a "windfall" payment is other than to give the further example of an income tax refund.

The commonly understood meaning of "windfall" is "an unexpected or sudden gain or advantage." Webster's Third New International Dictionary, 1986, definition 2. A property settlement pursuant to a divorce is not an unexpected or sudden gain of property but rather represents an equitable division of the "rights of the parties to their property." 15 V.S.A. ∍ 751(a) (emphasis added). A person who gets a lump sum divorce property settlement is getting nothing he or she did not already own although the property may have been owned in a different form. As such, that lump sum payment is quite different from an inheritance or a lottery jackpot or a personal injury award which can usually be thought of as bestowing something on a person he or she did not own before. Its commonly understood meaning and the examples given in the regulation which are consistent with that meaning make it clear that the term "windfall" should not be applied to a liquidated lump sum representing a division of property already owned by the ANFC recipient.

Although the Secretary's confusing "comments" accompanying the regulation at times could be interpreted as a desire to consider all lump sums as "income"[3], the regulations as written do not speak so broadly. HHS could easily have stated in its regulation that all lump sum payments regardless of source should be subject to the lump sum rule but it did not do so. Instead, very specific types of lump sums were included in the language of the regulation leaving the clear inference that there were others that should be excluded (which inference was further confirmed by the Secretary's remarks in the Supreme Court brief).

While "comments" may be helpful in construing ambiguous language, an interpretation of agency "comments", which directly conflicts with the language in the regulation itself, cannot be used to change the meaning of the regulation. The department is bound by HHS's regulation itself defining lump sum income. As that regulation cannot be reasonably interpreted to include "liquid assets" which are the result of a divorce property settlement, it must be concluded that the Vermont department's regulation including all liquid assets as lump sum "income" conflicts with federal regulation. Under federal law and regulation, the petitioner's divorce property settlement should be excluded from the definition of "income" and thus should have been treated as a "resource". The matter should be remanded to the department for recalculation of the petitioner's eligibility by treating her receipt of the lump sum divorce payment under the resource regulations.

FOOTNOTES

[1]See Senate Report No. 139, 97th Con., 1st session. 505 (1981).

[2]2250.1 Lump Sum Income

The applicant or recipient of ANFC is responsible for notifying the Department promptly upon receipt of any lump sum payment of earned or unearned income.

Lump sum payments, including windfall payments, shall be counted as income unless excluded under an exception cited below. Lump sum payments, including windfall payments, which have been set aside in a trust fund and which are excluded in accordance with ANFC policy relating to "Trust Funds" shall not be counted as income.

Additional exceptions to the above regulation are:

1) An income tax refund should be treated as a resource, except for any portion which is a federal Earned Income Tax Credit (EITC) refund. The latter is disregarded both as income and as a resource.

2) Insurance payments or similar third party payments, if received for payment of medical bills or funeral costs and used for those purposes, must be excluded. Also excluded would be a home owner's insurance payment (e.g. for a house which burned down) if it is used to rebuild or repair

the house or purchase a new one.

3) Renters' rebates, property tax rebates, sales tax rebates and Vermont Earned Income Tax Credits are excluded provided the sum of the rebates and credit does not exceed the difference between the annualized need standard (including the applicable housing allowance) and the annualized entitlement (payment standard before any recoupment) for that size family. If the sum of the rebates and credit is more than this difference, then the amount which exceeds this difference is considered lump sum income.

If the assistance group has net countable income, that income must be annualized and added to the annualized ANFC entitlement before it is subtracted from the annualized need standard. If the sum of the rebates and credit does not exceed the difference it is excluded for ANFC purposes. If the sum of the rebates and credit is greater than the difference, the balance must be counted as lump sum income.

Any amount of a renters' or property tax rebate which is excluded from income under this policy and is set aside for the purpose of using it to pay rent or property taxes due within 12 months of the assistance group's receipt of such rebate shall be excluded from resources in determining the assistance group's eligibility for ANFC.

Lump sum payments which are not excluded should be added together with all other non-ANFC income received by the assistance group during the month. When the total less applicable disregards exceeds the standard of need for that family, the family will be ineligible for ANFC for the number of full months derived by dividing this total income by the need standard applicable to the family. Any remaining income will be applied to the first month of eligibility after the disqualification period.

The period of ineligibility due to a lump sum benefit may be recalculated if:

1) An event occurs which, had the family been receiving assistance, would have changed the amount paid.

2) The income received has become unavailable to the family for circumstances beyond its control. Such circumstances include, but are not limited

to, death or incapacity of the principal wage earner, or the loss of shelter due to fire or flood.

3) The family incurs and pays for medical expenses which offset the lump sum income.

[3]The "comment" can perhaps be made sense of by considering that the generally applied meaning of "lump sum payments" prior to this regulation was only accumulated past benefits and that in addition to that traditionally understood meaning, "windfall" payments were to be added. Although the conversion of non-liquid assets to liquid assets could result in a lump sum type payment, there is no indication from the Department's comments and examples that such a lump sum was ever contemplated under this regulation. The specific and repeated division of lump sum income into the two mentioned classes (accumulated payments and windfalls) argues against an interpretation which would include as "income" any possible lump payment to a recipient, including the conversion of resources into cash. Nevertheless, HHS's comment language did cause a good deal of confusion as the petitioner's contentions in Lukhard indicate, confusion which the Secretary put to rest in her brief. Suffice it to say that HHS's comments can at best be described as a disservice to states trying to implement these regulations.

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